No. 11,869

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM H. NOVICK and ANNETTA NOVICK,

Appellants,

vs.

ANSON E. GOULDSBERRY,

Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

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STATEMENT OF BASIS FOR JURISDICTION.

On the 20th day of November, 1946, Anson E. Gouldsberry, the appellee above named, commenced this action in the District Court for the Territory of Alaska, for the Third Division, against William H. Novick and Annetta Novick, appellants above named, William Carroll and Lucille Carroll to recover from them $22,250.00 damages alleged to have been suffered by him because of an assault alleged to have been committed upon him by the defendants on the 5th day of July, 1946, in the Town of Seward, Third Division, Territory of Alaska. (Tr. pp. 2-7.) At the time of the

alleged assault, and when the complaint was filed, each of the defendants in said action was a resident of said Town of Seward.

The District Court for the Territory of Alaska is a Court of general jurisdiction. Act of June 6, 1900, 31 Stat. L. 321, as amended 35 Stat. L. 839, 840, C.L.A. 1933, Sec. 1091, the pertinent parts of which are: "There is established a District Court for the Territory of Alaska * * * with general jurisdiction in civil * * * causes."

The defendants' demurrer was overruled (Tr. p. 8) and their answer filed (Tr. pp. 9-14) and a reply was filed by plaintiff. (Tr. p. 15.) Trial was had before a jury which returned its verdict in favor of plaintiff against all the defendants for $2,500.00 compensatory damages and $1,000.00 punitive damages. (Tr. p. 17.) On June 30, 1947, judgment was rendered, filed and entered in favor of plaintiff and against the defendants, jointly and severally, for $2,500.00 compensatory damages, $1,000.00 punitive damages, and for plaintiff's costs and disbursements. (Tr. pp. 18, 19.) This appeal followed, and this Court has jurisdiction by virtue of the provisions of Sec. 225, Vol. 28, U.S.C.A. (Judicial Code, Sec. 128) as amended, the pertinent parts of which are: "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions * * * Third. In the District Courts for the District of Alaska, or any division thereof * * * in all cases."

STATEMENT OF THE CASE.

It is alleged in the complaint and admitted in the answer that on July 5, 1946, defendants William H. Novick and Annetta Novick were husband and wife and were the owners and operators of a public cocktail lounge in Seward, Alaska, and had in their employ as barkeeper in their cocktail lounge, defendant William Carroll; that on said date, plaintiff Anson Gouldsberry lawfully entered said cocktail lounge, and at the time of Gouldsberry's entry there were in said lounge, defendant William Carroll, defendant Lucille Carroll, and other customers. (Paragraphs I, II, III and IV of the Complaint, Tr. pp. 2, 3; Paragraphs I and II of the Answer, Tr. p. 9.) Shortly after Gouldsberry entered said cocktail lounge, defendant Annette Novick came into the lounge from an adjacent liquor store, also belonging to the Novicks, to get a drink of water and, after she had spoken to friends, returned to the liquor store. (Testimony of Mrs. Novick, Tr. p. 66; Ottoson, Tr. pp. 57, 60; Mrs. Carroll, Tr. p. 71.)

The evidence shows without dispute that the hour of Gouldsberry's visit to the cocktail lounge was sometime after 9:30 in the evening (Tr. p. 32); that within the forty days preceding said July 5, 1946, defendant Lucille Carroll had been divorced from plaintiff Gouldsberry and married to defendant Carroll (Tr. p. 70); that a short time prior to her divorce from Gouldsberry he had met her on the street with Carroll and had "slapped Carroll over" (Tr. p. 40); that when Gouldsberry entered the bar, Carroll was and had been sober for weeks (Tr. p. 79), and that he exchanged pleasant greetings with Gouldsberry (Tr.

p. 41) and indicated that his wife was sitting at the end of the bar. However, Gouldsberry sat at the bar some distance from Mrs. Carroll and drank from a bottle of beer. (Tr. p. 41.) A few moments later Gouldsberry moved over next to Mrs. Carroll and commenced talking with her; they began to quarrel and a fight soon started. (Testimony of Gouldsberry, Tr. p. 32; of Ottoson, Tr. pp. 56-58; of Lucille Carroll, Tr. pp. 70, 71 and 74.) Defendant William H. Novick was not present at any time during the time Gouldsberry was in the bar, but had gone to a restaurant and when he returned Gouldsberry was not in the bar. (Tr. p. 79.) As Mrs. Novick was seated in the liquor store adjacent to the cocktail lounge, she heard "a racket" in the cocktail lounge and "dashed in there to see what it was all about." (Testimony of Mrs. Novick, Tr. p. 66; of Ottoson, Tr. p. 58; and of Lucille Carroll, Tr. p. 71.) She found Gouldsberry and Carroll fighting and they were down on the barroom floor. Mrs. Carroll was also on the floor unconscious. Mrs. Novick first tried unsuccessfully to get Mrs. Carroll away from the fighters; then she ordered Carroll to get back of the bar, and he did. (Testimony of Mrs. Novick, Tr. p. 68; of Lucille Carroll, Tr. p. 71.) Then Mrs. Novick and Gilbert (the swamper) ejected Gouldsberry from the barroom onto the street, using no unnecessary force to do so.

Concerning the commencement of the fight and the trouble preceding it, the testimony of Gouldsberry conflicts with the testimony of every other witness who testified on the subject.

In the meantime, Charlie Peterson, who had been in the barroom while the fight was in progress had gone out and found a policeman and notified him of the fight, and thereafter had seen Novick and told him there was a fight at the bar. (Tr. p. 61.) Upon being notified, the policeman went immediately to the Novick bar; found Gouldsberry still on the street trying, according to the testimony of all witnesses but himself, to get back into the bar. The policeman arrested Gouldsberry and took him to the City Jail. It was then about 11:00 o'clock Friday night (Tr. p. 35); and Gouldsberry remained in jail until Saturday morning, when he was taken before the Municipal Magistrate, who set his trial for Monday morning, and released him. Gouldsberry went to Anchorage (114 miles), consulted an attorney, and returned to Seward. (Tr. p. 36.) He was tried before the Municipal Magistrate Monday morning upon two complaints, made Saturday, July 6th, one by the policeman, P. P. Kerestine, based upon Gouldsberry's action on the street; and one by Lucille Carroll and William Carroll charging Gouldsberry with assault and battery. (Tr. pp. 89, 90.) Gouldsberry was convicted on each complaint and fined $50.00 on the former and $100.00 on the latter. (Tr. pp. 89, 90.) He refused to pay his fines and was committed to jail where he remained two or three days before paying his fines. (Tr. pp. 90, 96, 97.) He did not appeal.

SPECIFICATIONS OF ERRORS RELIED UPON.

The Court erred and abused its discretion:

1. In overruling the motion of defendant William H. Novick, made at the close of plaintiff's rebuttal evidence, for a directed verdict in favor of said defendant, based upon the ground that there was insufficient evidence before the jury to justify a verdict for plaintiff, and the further ground that the verdict of the jury was for excessive damages appearing to have been given under the influence of passion or prejudice.

Assignment of Error No. I, motion for new trial, paragraphs (D) and (C).

2. In overruling the motion of defendant Annetta Novick, made at the close of plaintiff's rebuttal evidence, for a directed verdict in favor of said defendant, based upon the ground that there was insufficient evidence before the jury to justify a verdict for plaintiff. Assignment of Error No. I.

3. In denying the motion for new trial, made on behalf of each of the defendants William H. Novick and Annetta Novick, based on the ground that there was no substantial evidence to justify the verdict against either of said defendants. Assignment of Error No. II.

4. In instructing the jury as follows:

> "The use of abusive language by one person to another such as the calling of vile names, however repulsive or offensive such names may be, does not under the law justify or excuse an assault and battery on the person guilty of using

the offensive language. If you find from the evidence that the defendant William Carroll struck the plaintiff as alleged in the complaint, and if you further find that the plaintiff had not made and was not making any assault or battery on the defendant William Carroll, and that the only excuse offered by the defendant William Carroll for striking the plaintiff was the fact, if you find it to be a fact, that the plaintiff immediately before the defendant William Carroll struck the plaintiff called the defendant William Carroll, or the defendant Lucille Carroll, vile and offensive names, then it will be your duty to find for the plaintiff against one or more of the defendants, in harmony with these instructions such damages as you may find from the evidence the plaintiff suffered, not to exceed the amount asked in the plaintiff's complaint." (Tr. p. 101.)

Error is assigned on the above instruction on the ground that said instruction is not predicated on the evidence in the case, in that there was no evidence in the case to the effect that the defendant William Carroll offered any excuse for striking the plaintiff, and in that the defendant William Carroll was not a witness in the trial of said cause and in that the only evidence offered in the case as a justification of the acts and conduct of the said William Carroll referred to in said instruction was evidence of self defense; that said instruction was erroneous because it assumes throughout that the said William Carroll was the aggressor, and ignores his defense of self defense as set forth in the answer herein; and that said instruction was erroneous in that it ignores the

question whether or not the acts of William Carroll were in the scope of his employment, or were ratified by the defendants William H. Novick and Annetta Novick, or either of them, and in that said instruction in effect instructs the jury to find a verdict in favor of the plaintiff and against one or more of the defendants, provided the jury finds the facts to be as stated, recited or assumed in said instruction, and regardless of the defenses set up by the defendants and the testimony in support thereof; and in that the words "in harmony with these instructions" are so vague and meaningless as to in no wise qualify said instruction.

5. In instructing the jury as follows:

"An employer may be liable for the acts of employees resulting in injury to another person where the employee, in committing such injury, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if the employer ratified the act of his employee causing the injury to such other person.

If, in this case, you find from a preponderance of the evidence, that defendant William Carroll committed an unlawful assault and battery upon the plaintiff and that, in committing such assault and battery, the defendant, William Carroll, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if you find that such unlawful assault and battery was committed by defendant, William Carroll, and that the defendants William H. Novick and Annetta Novick or either of them,

ratified the act of the defendant William Carroll, in assaulting and beating the plaintiff, then the defendants, William H. Novick and Annetta Novick, may be held in damages as follows:

* * * * * * *

In this connection, you may consider and give such weight as you think proper to the testimony received in the trial of the case relative to the continued employment of defendant William Carroll by defendants William H. Novick and Annetta Novick, subsequent to July 5, 1946, the testimony of the alleged signing of criminal complaints against the plaintiff by defendants William H. Novick and Annetta Novick on or after July 5, 1946." (Tr. p. 103.)

To this instruction, the defendants Novick, in the presence of the jury and before it retired, objected as follows:

"Mr. Baumgartner. In regard to Instruction No. 5, it seems as though too frequent reference is made to the term 'within the scope of employment' without giving that phrase any definition, thereby making it possible for the jury to feel as though anything that might be done in there was within the scope of his employment. The plaintiff will undoubtedly play up very strongly the fact that anything that was done by Carroll was under the course of employment as a bartender. We would prefer to have some paragraph inserted to the effect that if the defendant Carroll conducted himself in such a manner as he did, he did not necessarily act within the scope of his employment." (Tr. pp. 112, 113.)

6. In instructing the jury as follows:

"An employer is liable for the acts of his employee, even if such acts are wilfull or malicious, where they are done in the course of his employment and within its scope. But where an employee does a wilfull and malicious act resulting in injury to another while engaged in working for his employer, but outside of his authority, as when he steps aside from his employment to gratify some personal animosity, or private grudge, or to accomplish some unlawful purpose of his own, not in any manner connected with his employment or the duties thereof, and completely outside of the scope of his employment, the employer is not liable, unless the jury finds by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained." (Tr. p. 120.)

To this instruction, the defendants Novick, in the presence of the jury and before it retired, objected as follows:

"Mr. Baumgartner. If the Court please, now, as this instruction stands isn't there a likelihood that the jury might feel as though simply because he was retained in employment—

Court. They may, but that seems to be the law.

Mr. Baumgartner. That wouldn't constitute ratification.

Court. It is evidence of ratification, that is, the law puts that construction on it, in my judgment. If you desire—?

Mr. Baumgartner. Yes, we except to that instruction.

Court. Well, the record will show that Mr. Baumgartner excepts to the inclusion of this additional language in No. 6. Is that right?

Mr. Baumgartner. Yes." (Tr. pp. 119, 120.)

The additional language designated by the Court is: "unless the jury finds by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained."

7. In refusing to instruct the jury as follows:

Defendants' Requested Instruction No. 1 (Tr. p. 115).

"The Court instructs you that the law is the the master, in this case Mr. and Mrs. Novick, is not responsible for the acts of the servant, in this case William Carroll, done outside of the masters' business and to accomplish some end personal to the servant himself; that the law does not imply any authority from the master to the servant to commit an assault upon a person who is not injuring or threatening to injure the master's property, and who is not interfering with the servant's performance of his duty to the master; and if, in this case, you believe from the evidence, that the defendant William Carroll struck the plaintiff Anson E. Gouldsberry for some reason or purpose of his own, the plaintiff cannot recover in this case from the defendants William H. Novick and Annetta Novick, and your verdict must be for the defendants William Novick and Annetta Novick; to which ruling defendants excepted and exception was allowed."

8. In refusing to instruct the jury as follows:
Defendants' Requested Instruction No. 2 (Tr. p. 116).

"The jury is instructed that the outcome of any altercation of an employee with others, resulting from an assault and battery precipitated by matters and things having nothing to do with the duties and employment of such employee, is not within the scope of the employment of such employee, and the employers cannot be held accountable therefor; that if the defendant William Carroll had any kind of personal quarrel with the plaintiff Gouldsberry, in or upon the premises of the defendants William Novick and Annetta Novick, and such quarrel resulted in injury or damage to the plaintiff Anson E. Gouldsberry, then the defendants William Novick and Annetta Novick cannot be held responsible, or liable therefor, unless it is shown by the evidence that the employers William Novick and Annetta Novick actually participated in the quarrel, argument or fight, or encouraged or aided the employee Carroll; to which ruling defendants excepted and exception was allowed."

9. In refusing to instruct the jury as follows:
Defendants' Requested Instruction No. 3 (Tr. p. 116).

"The jury is instructed, that if it is reasonably satisfied from the evidence on this trial that the plaintiff Anson E. Gouldsberry made threats to do harm to the defendant William Carroll, and if in fact the plaintiff Anson E. Gouldsberry carried out his threats by assaulting the defendant William Carroll, who was at the time an employee of the defendants William A. Novick

and Annetta Novick; and the defendant, in resisting the attack of the plaintiff Anson E. Gouldsberry, caused the plaintiff Gouldsberry any injury, then the defendant Carroll cannot be held liable therefor, and the defendants Novick, Carroll's employers, can in no manner be held responsible or liable for any injury or damage to the plaintiff Anson E. Gouldsberry; to which ruling defendants excepted and exception was allowed."

10. In refusing to instruct the jury as follows: Defendants' Requested Instruction No. 4 (Tr. p. 117).

"The jury is instructed that the proprietor of any place of business, has the right to remove any person therefrom if such person is conducting himself in a disorderly manner; that in this case, either Mr. or Mrs. Novick, or their employee, Mr. Carroll, had the right, and it was their duty, to cause the plaintiff to be removed, by force if necessary, from the bar or cocktail lounge, if, from the evidence, the plaintiff Gouldsberry was conducting himself in a manner not conducive to peace and good order, and if the plaintiff was making a disturbance likely to cause injury or damage to persons or property in or upon the premises of the Novicks; to which ruling defendants excepted and exception was allowed."

11. In refusing to instruct the jury as follows: Defendants' Requested Instruction No. 5 (Tr. p. 117).

"The jury are charged that if they shall be reasonably satisfied from the evidence that the

alleged assault and battery by Carroll upon the plaintiff in the case arose out of a personal dispute between the plaintiff and the said Carroll, they must find a verdict for the defendants, notwithstanding the fact that Carroll was in the employ of the defendant Novick at the time of the alleged assault, unless they shall be reasonably satisfied that defendant authorized or participated in such act; to which ruling defendants excepted and exception was allowed."

12. In giving to the jury the following portion of instruction No. 8 (Tr. pp. 105, 106),

"if you find that the plaintiff is entitled to recover damages from the defendants, or either of them, he is entitled to recover for the physical pain and mental anguish he endured, if any, as a result of the alleged assault and battery, and his incarceration in jail. * * *"

Error is assigned to this instruction for the reason that it affirmatively appears from the evidence that the plaintiff, Anson E. Gouldsberry, was arrested by a police officer of the town of Seward, complaint was filed against him by said police officer, upon which complaint he was tried and convicted; he was also tried upon a complaint signed by William Carroll and Lucille Carroll upon which he was tried and convicted. That these complaints were based upon his actions, and his physical pain and mental anguish, if any, endured because of his incarceration in jail were not caused in any way by these appellants or either of them, and his conviction was and is a complete defense to any action claiming damages by reason of his arrest and incarceration.

13. In givng the jury the following portion of instruction No. 9 (Tr. p. 107):

> "Accordingly, in this case you should determine from all of the evidence, first, whether the plaintiff is entitled to compensatory damages, and if so, whether he is entitled to recover such damages from all the defendants or from some or one of them, and then you may consider and should determine whether in addition to such compensatory damages you should award punitive damages in favor of the plaintiff and against the same defendants or defendant against whom you assess compensatory damages." (Tr. p. 107.)

Error is assigned to this instruction, as applied to these appellants, for the reason that there was no evidence submitted to the jury which warranted an instruction that the jury could award punitive damages against either or both of them.

QUESTIONS INVOLVED.

1. The jury having found that Carroll made an assault upon Gouldsberry was there any substantial evidence: (a) That such assault was within the scope of Carroll's employment? (b) That either appellant participated in such assault? (c) That either appellant ratified such assault?

Raised by motion for directed verdict (Tr. p. 84), motion for new trial (paragraphs C and D) (Tr. pp. 23, 24) and by exceptions to instructions 4, 5 and 6 given by the Court (Tr. pp. 101-105) and defend-

ants' requested instructions 1, 2, 3, and 5. (Tr. pp. 115-117.)

2. Did the Court correctly instruct the jury as to ratification: (a) In failing and omitting to instruct them that full knowledge as to the facts is essential and a prerequisite to a ratification? (b) In instructing the jury that ratification was a question of fact for them to determine? (c) In omitting to instruct the jury that an employer cannot ratify the tort of his employee done outside the scope of the employee's authority unless the employer has received some benefit or advantage from the tort? (d) In instructing them as to the particular parts of the testimony they could consider as evidence of ratification, thereby inviting them to find ratification and in effect saying that if those facts existed they proved ratification?

Raised by exceptions to the Court's instructions 4, 5, and 6, and defendants' requested instructions Nos. 1, 2, 3 and 5, supra.

3. Was any instruction on ratification warranted by the evidence?

Raised by the Court's refusal to give defendants' requested instructions Nos. 1, 2, 3, and 5. (Tr. pp. 115-117.)

4. Was there sufficient evidence to warrant the jury in rendering a verdict for punitive damages against these appellants?

Raised by motion for directed verdict, motion for new trial, and refusal of Court to give requested instructions, supra.

5. Was there sufficient evidence to warrant the jury in rendering any verdict against these appellants?

Raised as 3 and 4, supra.

6. Did the Court's instruction No. 4 (Tr. p. 101), amount to a direction to the jury to find a verdict for plaintiff, and if so was it justified by the evidence?

Raised by appellants' "Statement of Points on Appeal." (Tr. p. 131.)

ARGUMENT.

THE PLAINTIFF HAD FAILED TO PROVE A CAUSE OF ACTION AGAINST APPELLANTS NOVICK SUFFICIENT TO BE SUBMITTED TO THE JURY (A) AT THE CLOSE OF THE PLAINTIFF'S TESTIMONY; AND (B) AT THE TIME OF THE MOTION FOR NEW TRIAL.

Appellants recognize that the motion for a directed verdict or for a nonsuit, and the motion for a new trial made for the reason that the plaintiff had failed to prove his case, is each addressed to the sound discretion of the trial Court and are not reviewable except for a manifest abuse of that discretion. *Copper River & N. W. Ry. Co. v. Reeder,* 211 Fed. 280, 286.

Abuse of that discretion is "manifest" when, upon an examination of the record, the Appellate Court finds that there is no SUBSTANTIAL evidence to support the verdict, and "substantial evidence" "is something of a substance and relevant consequences, and not vague, uncertain or irrelevant matter not carrying the quality of 'proof' or having fitness to

induce a conviction." *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 643.

It is conceded that the plaintiff's positive testimony (Tr. p. 33) warranted the trial judge in submitting to the jury the issue as to whether Gouldsberry or William Carroll commenced the affray. Assuming that the jury obeyed the first paragraph of the Court's Instruction 4 (Tr. p. 101), it must have found that Carroll was not assaulted as alleged by Lucille Carroll (Tr. p. 71), and in that respect the verdict of the jury must stand.

THE SERVANT WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT.

The testimony of Lucille Carroll (Tr. p. 70, et seq.), substantiated by that of Ottoson (Tr. pp. 56, 59), and Gouldsberry's own specific admissions (Tr. p. 42) show the circumstances immediately prior to and leading to the affray. Trouble commenced when Gouldsberry began an argument with Mrs. Carroll. It is apparent from the testimony that Carroll, the then newly married husband, probably smarting under the recollection that he had been recently "slapped over" by Gouldsberry (Testimony of Gouldsberry, Tr. p. 40) and angry at hearing his wife berated, embarked upon his own private quarrel. Whether the altercation between Gouldsberry and Mrs. Carroll was as described by Gouldsberry (Tr. p. 42), merely an intimation by Gouldsberry that as his wife Mrs. Carroll had favored another at his expense, or whether it

involved the specific insults and accusations that Mrs. Carroll described (Tr. pp. 70, 71, 73 and 74) or was "bad, or vile—slander * * *" as Ottoson testified (Tr. p. 58) no reasonable person can doubt from all the testimony that Carroll in assaulting Gouldsberry was venting his ire at an unpleasant situation created by Gouldsberry, and no reasonable person can avoid the conclusion that when Carroll made that attack he was neither acting within the scope of his employment nor engaging in his employer's business. Nor did his action further the interests of his employers nor was it so intended.

Not only do the circumstances plainly indicate that Carroll's attack on Gouldsberry was not within the scope of his employment, but, under the Court's instruction 5 C. (Tr. p. 122), if given, "An act cannot be said to be within the scope of the employment, where the employer himself, if present would have no authority to do the act," the jury were practically instructed that Carroll's attack was not within the scope of his employment, since it is apparent that Novick if present would have no authority to make it.

Appellants contend that the above evidence places this case on all fours with *Washington Gas Light Company v. Lansden,* 172 U.S. 534, 544, 545 and 548; 43 L. Ed. 543; 19 S. Ct. 296; an action against the Gas Light Company as employer and Bailey, its secretary, Orme, its assistant secretary, and Leetch, its general manager, for a libel alleged to have been published by the defendants. Verdict was for the

plaintiff. The trial Court denied a new trial and entered judgment on the verdict. That judgment was affirmed by the Court of Appeals for the District of Columbia, and the defendants brought the case before the Supreme Court on a writ of error.

After a detailed review of the evidence, in which it appeared that Leetch, the general manager, had written the letters which instigated the libelous publication, the Court then considered the question whether the acts of Leetch were within the general scope of his employment as manager, saying (p. 545):

> "We are then limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide."

After reviewing the evidence as to the duties of the general manager, the Court said (p. 548):

> "We are of the opinion that the court erred in submitting to the jury the question whether Leetch, in respect to the subject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to base a verdict against it."

Similar to the instant case is *Barney v. Jewel Tea Company, Inc.,* 139 Pac. (2d) 878, an action brought by Lucinda Barney against the Tea Company, as master, and George A. Davis, as servant, to recover compensatory and punitive damages suffered by reason of an assault upon her made by Davis, a collector for the Tea Company, arising from her refusal to pay her bill without receipts for former payments. Just as in the case at bar, a fight followed, in which a number of people were more or less involved. A verdict was rendered for the plaintiff against the defendants, and the Jewel Tea Company appealed. The Supreme Court reversed because the servant Davis was not acting within the scope of his authority. After noting that the authorities were conflicting, the Court said (p. 879):

> "We believe the better rule to be that a principal is not liable for the wilful tort of an agent which is committed during the course of his employment, unless it is committed in the furtherance of his employer's interests, or unless the employment is such that the use of force could be contemplated in its accomplishment." (Citing a number of authorities: among others, the American Law Institute's Restatement of the Law of Agency, Vol. 1, Sec. 245, and cases from Alabama, Kansas, Washington, New York, Kentucky and Minnesota.)

Appellants respectfully urge that an examination of the evidence in the instant case leads to the conclusion that the question as to whether Carroll was

acting within the scope of his employment became one for the Court to decide, and that the judge erred in submitting it to the jury. He should have instructed that Carroll's acts were not within the scope of his employment.

According to the trial Court's instructions there were two ways in which a verdict against appellants would be warranted, even though the jury found that Carroll's tort was not within the scope of his authority: (1) If the defendants or either of them participated in the attack, the jury could bring in a verdict against the defendant or defendants so participating (Instruction 5, Tr. p. 104; Instruction 6, p. 105; and Instruction 3-A, p. 101); and (2) if the defendants or either of them ratified the said alleged unlawful acts of defendant William Carroll, the jury could bring in a verdict against the defendant or defendants so ratifying. (Instructions 5 and 6, Tr. pp. 102, 103, 104 and 105.)

NEITHER DEFENDANT PARTICIPATED IN THE BATTERY.

It is admitted that William Novick took no part in the affray but in his complaint Gouldsberry alleged that Mrs. Novick participated in the actual battle.

In appellee's testimony on direct examination he described the attack made by Carroll (Tr. p. 33) and testified "After I was on the floor, I felt something beating on me and I twisted and turned and kicked and fought to get up and protect myself."

"Q. Do you know who it was that was on you at that time?" (Tr. p. 34.) "A. At that time? Well, I was knocked unconsciously. Mrs. Novick was there at the bar when I offered to buy her and Charlie Ottoson and Carroll a drink. Whether I did or not, I can't recollect—whether she accepted a drink or not * * *. When I come to and was near the door I know that Mrs. Novick had her hands on my shoulders shoving me to the door."

On cross-examination Gouldsberry testified (Tr. p. 43) that from the time the bottle hit him until he "got to the door" he knew nothing except that he was knocked backward off the stool and onto the floor, and he remembers he had blood in his eyes and he twisted and turned to get up. To the direct question (Tr. p. 44), "Did Mrs. Novick strike you?" he answered, "I can't say that she struck me, no." Five times thereafter, in answer to direct questions as to Mrs. Novick's striking him, he replied that he did not know (Tr. pp. 44, 45) and, finally (Tr. p. 48), he again said, "I say, I don't know who was beating on me. Mrs. Novick had ahold of me. Nobody was striking me when they were taking me to the door. Yes, somebody was striking me when I was on the floor, when I become partly conscious." "Q. Who Mr. Gouldsberry? A. Mrs. Novick and Mrs. Carroll and the fellow who worked in the second hand store. Q. They were striking and beating you? A. Yes, stomping on me and kicking me—I don't know what they were hitting me with. Q. You remember that definitely now? A. Yes, when I come

to, when I was knocked out on the floor and I felt something beating on me and I seen who was around me—I did see them, yes. There was blood in my eyes. I couldn't see very well. I could see well enough to see that." (Tr. p. 48.)

Contained in the testimony following the question "Who Mr. Gouldsberry?" supra, is the only testimony in the whole record where anyone even indicates that Mrs. Novick struck Gouldsberry. Mrs. Carroll, Mr. Ottoson and Mrs. Novick herself deny that she struck or beat Gouldsberry. After Gouldsberry's many refusals to say that he knew Mrs. Novick struck him, his last answers as to what he saw when he was becoming conscious were evidently explanatory. He was saying that Mrs. Novick was among those who were around him when he could knowingly distinguish them, and her presence convinced him that she had taken part in the beating. Appellants contend that Gouldsberry's testimony with its inconsistencies and contradictions was not "substantial evidence" and did not carry the quality of "proof" or "having fitness to induce a conviction." *Jenkins & Reynolds v. Alpena Portland Cement Company,* supra.

To charge Mrs. Novick as a participant she must have been shown to share in Carroll's criminal intent. (16 C. J., p. 128, Criminal Law, Sec. 115.) There is no testimony that Mrs. Novick had a community of "unlawful purpose" in Carroll's act. It is indisputable that when she arrived, she directed Carroll to leave, and he went. Her activities were all directed

to stopping the fight and restoring order. Since the jury's verdict against Mrs. Novick must have been based upon participation, the Court should have set it aside.

NEITHER APPELLANT RATIFIED CARROLL'S ASSAULT.

In Instruction 5, the Court directed the jury's attention to testimony which might be considered as ratification by these appellants, to-wit:

First: Retention of Carroll as an employee.

This was mentioned only twice in the testimony. Mrs. Novick testified (Tr. p. 69): "I don't remember how long Mr. Carroll worked for me after this. I don't remember. He did not quit the next day. I don't remember whether he quit the next week or not. I can't tell you because I don't know."

Novick testified (Tr. p. 79): "I believe he continued in my employ about two or three weeks."

In *Williams v. Pullman Palace Car Company,* 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631, an action for damages based upon a porter's attack upon a passenger, verdict and judgment were for plaintiff against employer. The porter was criminally prosecuted and convicted of assault and battery; and was thereafter retained in the company's employ. It was claimed that such continued employment amounted to ratification. The Court said:

> "The porter had been discharged for other causes before the trial of this suit, and we think the defendant company cannot be charged with

> ratification of such an outrage because in the conflict between the statements of parties it believed its own servant and at all events thought it just to preserve the status quo until judicial determination of the dispute." (The judgment was reversed.)

In *Kastrup v. Yellow Cab Company,* 282 Pac. 742, which was an action to recover damages for battery inflicted on Kastrup by the company's superintendent of cab drivers, there is a rather exhaustive discussion of almost every question raised in the instant case. It was there claimed that because Harris, who made the assault, was not discharged it amounted to ratification. The Kansas Supreme Court quoted with approval from *G., C. & S. F. Ry. Co. v. Kirkbride,* 79 Tex. 457, 15 S. W. 495, as follows:

> "We think it would be extending the doctrine of ratification too far to apply it to such a case as the one before us. * * *
>
> The rule invoked (that retaining the employee in the employment was ratification) might lead to the discharge of an innocent and useful servant, when wrongfully accused or suspected, because his employer could not be certain in advance what would be the result of a future trial, and, instead of taking the risk of being charged with a pecuniary liability for which he was not otherwise responsible, might discharge the servant."

Second: Testimony as to signing complaints.

The city magistrate who tried Gouldsberry produced the original complaints (copies are in the transcript, pp. 124, 125), upon which he was tried,

neither of which was signed by the Novicks; and he testified (Tr. p. 89): "I don't believe Mr. or Mrs. Novick ever made a complaint against Gouldsberry." Mr. and Mrs. Novick each denied having signed any complaint against Gouldsberry. (Tr. p. 95.)

Pallage testified (Tr. p. 97) that he saw, at the police station, a complaint signed by Mr. and Mrs. Novick; and Kerestine first testified that Mr. and Mrs. Novick signed a complaint, and then admitted (Tr. p. 92) that he was "probably" mistaken. Also, neither the testimony of Pallange or Kerestine was competent to charge the appellants since neither witness saw them sign and neither showed knowledge of the appellant's handwriting. If Mr. and Mrs. Novick did sign a complaint against Gouldsberry, there is nothing to show that they did not believe Gouldsberry was guilty of an assault upon Carroll and by signing a complaint against Gouldsberry they only put in motion an inquiry. Whether they put that inquiry in motion or whether it was put in motion by someone else, the fact remains that Gouldsberry was tried and convicted, and there is no testimony that either Novick testified in Gouldsberry's trial. It seems apparent that ratification could not be based upon the signing of those complaints.

Third: Testimony relative to an oral statement alleged to have been made by William H. Novick.

The only applicable statement claimed to have been made appears on page 37 of the transcript. There Mr. Gouldsberry testified as to a converastion with Novick on the Monday morning after Gouldsberry's

trial in the Municipal Court, to this effect: "He wanted to know, he said 'What's the matter with you Gouldsberry? Are you crazy? If I had been there I would have broken your Goddam neck. * * *' " Novick denied the statement as Gouldsberry had related it. (Tr. p. 95.) Assuming that Novick did make that statement exactly as Gouldsberry testified, we confidently assert it did not constitute ratification. It was made immediately after the trial at which Gouldsberry was found guilty, and did not indicate any intention of Novick to take upon himself any error which was made in that trial. It was simply a comment based on what Novick believed were the facts.

The general principles of ratification are stated in *Labatt (Master and Servant)*, Second Edition, Vol. 7, page 7896, and in 15 *Am. Jur. (Damages)*, page 37, Section 289. These authorities say in almost the same words:

> "On general principles to authorize an inference of ratification it must appear that the party ratifying had knowledge of all the facts and circumstances attending the transaction or that he had an intention to take upon himself, without inquiry, the risk of any improper act as his own."

So in the instant case we submit that there was not sufficient evidence of ratification, either in the alleged statement of Novick or his retention of Carroll in his employ for a short time; and the Court should have granted appellants' motion for a new trial on the ground of insufficiency of the evidence.

THERE WAS PREJUDICIAL ERROR IN THE COURT'S INSTRUCTIONS.

First. In defining "within the scope of employment" and submitting to the jury the question whether Carroll's acts were within the scope of his employment.

Second. In instructions as to ratification: In advising the jury that they were the sole judges of what constitutes ratification; in failing to define ratification; in failing to point out to the jury any conditions limiting the kind of acts subject to ratification; in failing to point out to the jury the necessary elements of acts of ratification; and in designation of testimony to be considered by the jury as showing ratification.

Third. In giving ambiguous Instruction No. 4.

Fourth. In including among items which the jury could consider in determining compensatory damages, "incarceration in jail."

Argument will be addressed to these points under the numbers above.

First: Scope of employment.

Restatement of the Law of Agency, Chapter 7, Section 228, defines this phrase as follows:

> "Conduct of a servant is within the scope of employment if, *and only if:* (A) It is of the kind he is employed to perform * * * (C) is actuated at least in part by a purpose to serve the master. * * *" (Emphasis added.)

The requisite element required by "(C)" is entirely omitted in the Instruction given by the Court,

and this omission is important when, as here, the trial judge left to the jury the determination of whether the battery was or was not within the scope of the servant's employment. The sufficiency of the evidence in this connection is discussed above under the heading "The servant was not acting within the scope of his employment".

In this connection, Restatement of the Law of Agency, in a comment as to Section 235, says: "Outrageous acts may indicate that the servant is not actuated by an intent to perform his master's business," citing, for California, the following cases: 168 Cal. 715, 144 Pac. 961; 42 Cal. App. 606, 185 Pac. 694; 58 Cal. App. 587, 209 Pac. 85; to the same effect, *Williams v. Pulman Co.,* supra.

The Court instructed correctly (Inst. 5 C., Tr. p. 122): "An act cannot be said to be within the scope of the employment, where the employer himself, if present, would have no authority to do the act". The jury found punitive damages therefore they must have found that Carroll's acts were wilful or malicious (Inst. 6, Tr. p. 105), and it follows that neither of the appellants would have had authority to commit those acts and they were therefore not within the scope of Carroll's appointment.

Considering the evidence given and the character of the act, and the fact that the burden of proof, as the Court instructed, was on the plaintiff, appellants urge that the Court should have instructed the jury that Carroll was not acting within the scope of his em-

ployment, and left the appellants' liability to rest upon ratification, if any.

> "Where there is no dispute as to the facts and they are susceptible of but one inference, the question (scope of employment) is one of law and should not be submitted to the jury."
>
> 39 *C. J.*, page 1363, "Master and Servant", Section 1593.

Second: Instructions as to ratification.

The Court erred in instructing the jury (Inst. 5, Tr. p. 104): "What constitutes ratification is a question of fact for the jury to determine". We respectfully urge that the elements which constitute ratification are for the Court to decide, and it should have instructed the jury as to those elements. Whether those elements were present or not was a question of fact for the jury to determine only if the evidence was conflicting.

Restatement of the Law of Agency, Volume 1, Chapter 4, page 197, section 82, gives this definition of ratification:

> "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act as to some or all persons is given effect as if originally authorized by him."
>
> In order to constitute one a wrongdoer by ratification, the original act must have been done in his interest or have been intended to further some purpose of his own. Cooley on Torts 127."

39 *C. J.* 1266, "Master and Servant," Section 1448, "Ratification by Master", sets forth the requirements of ratification as follows:

> "There can, of course, be no ratification unless the act was done for the master or at least purported to be done for him. The ratification must be with full knowledge of the tortious character of the act. Ratification of an unauthorized and unlawful act can be inferred only from the acts which evince clearly and unequivocally the intention to ratify and not from acts which may be readily and satisfactorily explained without involving such intention.[22] The mere retention in the employment of the servant who has been guilty of the wrongful act complained of does not amount to ratification of his act so as to impose liability on the master, even though the master had knowledge of the servant's wrongful act, but it has been held that this amounts to some evidence of ratification. On the other hand, if the master, with knowledge of the wrongful act, accepts the benefits thereof, there is a ratification which renders him liable."

See also quotation from

Labatt (*Master and Servant*), 2d Ed., Volume 7, page 7896, supra..

To the same effect,

15 *Am. Jur.* 731, *Damages,* Section 289.

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[22]Cities, *Voss v. Baker*, 28 Fed. Cas. No. 17012; 1 Cranch. CC 104; *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 Pac. 771; and cases from Connecticut, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, New York, Pennsylvania, Texas and Wisconsin.

In *Dillingham v. Anthony,* 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139, the Chief Justice propounds this question:

> "If there were no other ground on which appellants could be held liable for actual damages resulting from the injuries received by appellee from the battery made upon him by the conductor *than that they had ratified his act,* could their liability be fixed on that ground however clear their subsequent approval of his act might be made to appear? 'In order to constitute one a wrongdoer by ratification, the original act must have been done in his interest or intended to further some purpose of his own.' * * * In the case before us there can be no pretense that the act of the servant was done in the interest of appellants, under a pretense of authority from them or to further any interest of themselves or the corporation whose business and property they were controlling, and *there was no ground on which to base ratification which is but an agreement express or implied by one to be bound by the act of another performed for him.*" (Emphasis added.)

One of the principles of the citations above was announced in *Sullivan v. People's Ice Corp.,* 92 Cal. App. 764, an assault case in which there was a verdict for plaintiff, which was affirmed. In the opinion, written by Judge Sturtevant, it is said:

> "The law is well laid down in distinct terms in the passage from the 4 Inst. 317, 'he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his

> agreement subsequent amounteth to a commandment.' The question of liability by ratification depends upon this, whether the act was originally intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it."

Justice Clifford, in *Supervisors v. Schenck,* 5 Wall. 772, 782, 18 L. Ed. 556, discussing ratification of acts of agents done in excess of authority, says:

> "Such ratification may be by express consent, or by acts and conduct of the principal *inconsistent with any other hypothesis than that he approved and intended to adopt what had been done* in his name." (Emphasis added.)

None of the testimony to which the Court directed the attention of the jurors in connection with ratification could amount to ratification within the above principles.

Retention in employment has been held to be some evidence of ratification, but the rule as to that situation is set forth in 35 Am. Jur., 998, "Master and Servant," Sec. 563, as follows:

> "Where the evidence shows that the employee's wrongful act was one which served the personal interest of the employee and could not have appertained to the employer's business, the defendant cannot be found liable because he retained the wrongdoer in his employ." (Citing *Everingham v. Chicago B. & Q. R. Co.,* 148 Iowa 662, 127 N. W. 109, Ann. Cas. 1912C 848; *Kwiechen v. Holmes & H. Co.,* 106 Minn. 148, 118 N. W. 668,

99 L.R.A. (N.S.) 255; *Wells v. Robinson Brothers Motor Co.,* 153 Miss. 415, 121 So. 141; *Mandel v. Byron,* 191 Wis. 446, 211 N. W. 145.)

In *Kastrup v. Yellow Cab Co.,* supra, the trial Court charged the jury that:

> "if the servant of defendant acted without the scope of his authority when ordering plaintiff to descend from the car they should find for the defendant 'unless you should further find from the evidence that the defendant after full notice of the conduct of its employee, ratified the same by retaining him in its employment, in which last case you will find for plaintiff.' "

Of which the Supreme Court of Kansas said:

> "This charge, we think, was erroneous. We are not prepared to hold that the performance of a wrongful act by a servant, for which his employer for any reason is not liable at the time the act is committed, shall become the act of the employer afterwards, simply because he refuses to discharge the servant from his employment."

It will be noted that the Kansas Court, in charging the jury, put in the qualification "after full notice of the conduct of its employee," which was never given anywhere as a condition by the trial judge in the instant case; and, while in the instant case, the trial judge did not go as far as the Kansas judge when he said "ratified the same by retaining him in its employment," still the effect, so far as the jury was concerned in the instant case, must have been just the same as the Kansas judge's instruction. No limi-

tation of any sort was placed upon the direction to the jury that the mere fact of retention in employment might be sufficient evidence of ratification to bind the appellants. There was no evidence upon which the jury could have fairly found that the act of Carroll was ratified if the Court had properly instructed them as to the qualifications surrounding ratification as indicated above, and there was no testimony upon which the Court should have based an instruction upon the theory of ratification, since it is plain from the testimony that the Novicks could not be held to have been liable through ratification.

Adverting to the testimony which was indicated by the judge as applicable to the question of ratification, to-wit, "the testimony of the alleged signing of complaints against the plaintiff," those were criminal complaints. The Novicks were not seeking to gain any benefit, financial or otherwise, for themselves, even if they had signed those complaints, and their action in that respect would not have been "inconsistent with any other hypothesis than ratification". The facts were plain before the Court that Goulds-berry was not prosecuted upon any complaint signed by them, and the Court had no evidence before it upon which to base its instruction in that respect.

Third: Ambiguous and obscure instruction.

The Court's instruction No. 4 (Tr. p. 101) is erroneous not only because it assumes evidence by William Carroll, a person who did not testify, but also be-also because it might be construed as an unrestricted

authorization to find a verdict for plaintiff against all the appellants. Without any differentiation between the liability of employer and the tort feasant servant the Court instructs that if the jury find that certain acts were done by Carroll, "then it will be your duty to find for the plaintiff against one or more of the defendants, in harmony with these instructions such damages as you may find from the evidence the plaintiff suffered" * * *

There is no comma between the parenthetical clause "in harmony with these instructions" and the words "such damages" and the clause could be construed to modify "such damages." The clause could also be referred to and modify the words "for the plaintiff." Neither of these allocations would do violence to grammatical construction. Granting that the Court may have intended to instruct a verdict against Carroll only, yet he owed a duty to these appellants to so word his instruction that the jury could not consider it an instruction to find against appellants.

Fourth: Error in instructing as to the elements of damages.

The Court instructed (Inst. 8, Tr. p. 105) that if entitled to damages the plaintiff might "recover for physical pain and mental anguish he endured, if any, as a result of the alleged assault and battery, *and his incarceration in jail* as well as * * *."

This instruction ties in closely with that in Instruction 5 inviting the jury to consider signing of criminal complaints as evidence of ratification, and we confidently assert it is erroneous, for the reason that it

authorizes the plaintiff to recover in this action damages he could not have recovered in a direct action against any of these defendants, and especially the appellants, for malicious prosecution, false imprisonment, or conspiracy to maliciously prosecute or falsely imprison.

It is elemental that to recover damages by direct action in such cases the fact of conviction is a complete and effective bar to recovery.

34 *Am. Jur.* 720, "Malicious Prosecution," Sec. 29.

Reasonable cause is also a bar. Another reason that the Court's instruction is wrong is because there is no recognition of the rule of proximate cause and intervening cause. The evidence here shows that Gouldsberry's actions on the street were the cause of one complaint and conviction, and also that there was ample opportunity during his resistance to the police for him to have broken his ankle. (Tr. pp. 64, 83, 84.) No instruction was given to cover these matters.

So far as counsel's search has gone, no case has been found that even squints at allowing a plaintiff to enter by the back door and get what the law would not give him if he entered by the front door. The undisputed facts that were before the Court negative Gouldsberry's right to such damages.

If the instruction referred to was as we think plainly wrong, it was vital for the reason that the jury gave both compensatory and punitive damages and

no one can tell to what extent or in what amount they were awarded because of this wrong instruction.

It is true no objection was directly made to the instruction as given but there was objection to the general instruction as to ratification and as to the whole of Instruction 5, with which this Instruction 8 ties in. In any case we urge that it was a plain prejudicial error and should be noticed as such.

In conclusion, we respectfully urge that the judgment in this case should be reversed, first, because there was not sufficient evidence to warrant the jury's verdict against appellants for either compensatory or punitive damages and, second, because the Court's instructions were prejudicially erroneous as above indicated.

Dated: August 11, 1948.

Respectfully submitted,

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